No. 11758.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Estate of Joseph H. Heidt, Deceased; Louise Seeley, Executrix,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF OF LEON B. BROWN AND JOHN W. ERVIN AS AMICI CURIAE.

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TABLE OF AUTHORITIES CITED.

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Leave of Court having first been obtained, the undersigned, appearing as *amici curiae,* present herewith the following brief in support of the petitioner on this appeal.

The 1942 Amendment to Section 811(e) of the Internal Revenue Code Did Not Change the Taxable Portion of Joint Tenancy Property Theretofore Acquired With Community Funds.

It appears to be undisputed that the properties held by the decedent and the petitioner as joint tenants were all acquired prior to the effective date of the Revenue Act of 1942, and it is assumed, as petitioner contends, that at least a portion of the funds used to acquire these properties consisted of community funds in which the decedent and the petitioner each had a vested one-half interest under

Section 161a of the California Civil Code. Under such circumstances, there can be no doubt that under Section 811(e) as it read prior to the 1942 amendments it would have been necessary to exclude from the gross estate of the decedent that portion of the joint tenancy property which was derived from the petitioner's one-half interest in the community funds. (*Estate of Paul M. Vandenhoeck,* 4 T. C. 125, 137.) This was so because the words "originally belonged to" in Section 811(e) established *ownership* as the test of exclusion, and ownership depends entirely upon state law. In California, under Section 161a, the wife's interest in community property is a "present, existing and equal" interest which has been held to be a vested interest for estate tax purposes.

United States v. Goodyear, 99 F. (2d) 523;

Bank of America v. Rogan, 33 Fed. Supp. 183.

Section 402(b) of the Revenue Act of 1942 added to Section 811(e) a new paragraph dealing with property held at the date of death as community property, but made no change in the language of the preceding paragraph dealing with property held in joint tenancy. Joint tenancy property is, of course, not community property, even when acquired by husband and wife with community funds.

Siberell v. Siberell, 214 Cal. 767, 7 P. (2d) 1003.

Notwithstanding the failure of Congress to make any change in the statutory provision expressly relating to joint tenancy property, the Commissioner on March 10, 1943, by T. D. 5239, amended Section 81.22 of Reg. 105, to provide, in effect, that in estates of decedents dying after October 21, 1942, joint tenancy property purchased with

community funds should be taxed as if it were community property. Now, it is obviously beyond the power of the Commissioner of Internal Revenue to change the law. (*Manhattan General Equipment Co. v. Commissioner,* 297 U. S. 129, 80 L. Ed. 528, 531; *Estate of Louis Stockstrom,* 7 T. C. 251, 254.) The regulation can be sustained only if the change was made impliedly by Congress itself.

The brief of respondent attempts to sustain the regulation by asserting in effect that Congress in 1942 established a new rule of ownership of community property for all estate tax purposes. Had Congress intended to do this, how simply it could have been done! It was necessary only to insert in Chapter 3 of Subtitle A of the Code one short section providing that "for the purposes of his chapter" community property should be treated as the property of the decedent, with certain exceptions. But Congress did *not* enact any legislation so broad or sweeping in scope. Instead, it dealt separately and specifically with property held at death as community property (Section 811(e)(2)), with taxable *inter vivos* transfers of community property (Section 811(d)(5)), and with life insurance purchased with community funds (Section 811(g)(4)). Congress apparently intended to limit the community property revisions to these particular subjects.

Even in connection with these three particular revisions Congress did not fail to recognize the wife's vested interest in community property. In each case the community property was referred to as held "by the decedent and surviving spouse," but it was provided that such community property, with certain exceptions, should be taxed *as if* held by the decedent alone.

It is especially significant that in dealing with proceeds of life insurance, the taxability of which depended on the ownership of the funds used to pay the premiums, Congress expressly provided in Section 811(g)(4) for cases in which premiums were paid from community funds, but that in considering joint tenancy property, the taxability of which also depended on the ownership of the funds or other property with which it was acquired, Congress made no provision for cases in which the property was acquired with community funds. Its failure to legislate on this latter subject can hardly have been accidental. Perhaps the members of Congress sought a closer correlation of the rules applicable to joint tenancy property and property held in common, for there is no apparent reason why jointly owned property acquired with community funds should be taxed in its entirety, while property acquired with community funds by husband and wife as tenants in common is taxed only to the extent of one-half.

The principal argument of the Commissioner in support of the regulation under discussion is that it is necessary to prevent tax avoidance by conversions of community property into joint tenancy. This argument, however, completely fails when we consider Section 402(a) of the 1942 Revenue Act, by which Congress added Section 811(d)(5) to the Internal Revenue Code. By this amendment Congress expressly provided that transfers of community property in contemplation of death should be considered to have been made by the decedent, with the same exceptions as are provided in Section 811(e)(2). In other words, Congress expressly dealt with the problem of tax avoidance through conversions of community property into other forms of co-ownership, but limited the correc-

tive provision to cases in which the conversions were made in contemplation of death. Even if we should concede, which we do not, that the Commissioner may legislate to prevent tax avoidance where Congress fails to do so, there is no legislative vacuum to fill in the instant case. Indeed, the regulation under discussion violates the apparent Congressional intent to recognize, for estate tax purposes, property rights acquired by conversions of community property where the transfers are *not* in contemplation of death or otherwise within the proscriptions of subsections (c) and (d) of Section 811.

In the present case there is no contention that the joint tennacy property was acquired through conversions of community property in contemplation of death. Indeed, the joint tenancy property was acquired at a time when community property was subject to no heavier death taxes than other forms of cotenancy. The Commissioner, however, under the authority of his own regulation, asserts in effect that the joint tenancy property must be taxed as if it were community property *simply because it is derived from community property.* This reasoning has heretofore been rejected by the Tax Court. Thus, property held by husband and wife as tenants in common has been held taxable only to the extent of the decedent's one-half interest therein, notwithstanding the fact that it was derived from joint tenancy property which would have been fully taxable if held as such until death.

> *Merry M. Dennis, Executrix,* 26 B. T. A. 1120;
> *Estate of Irwin A. Smith*, 45 B. T. A. 59.

The opinion of the Tax Court in this case attempts to sustain the regulation under discussion on quite a different

theory than that presented in the respondent's brief, but one which is equally untenable. The Tax Court says, in effect, that the wife's interest in community property is derived from the husband, that the question is whether she received her interest in the joint tenancy property "for less than an adequate and full consideration in money or money's worth," and that under Section 811(e) only that part of community funds derived from personal services or separate property of the wife is to be considered as constituting "money or money's worth" within the meaning of Section 811(e)(1). The underlying premise, as stated in the opinion, is that "the wife's former interest in the community property is not regarded as property originally belonging to her." This premise is clearly erroneous. The California courts have consistently held that the wife's interest under Section 161a of the Civil Code comes into existence at the same time as the husband's and is in no sense derived by her from him. (*Cooke v. Cooke,* 65 Cal. App. (2d) 260, 150 P. (2d) 514, 516.) And that this is the rationale of such cases as *Poe v. Seaborn,* 282 U. S. 101, 75 L. Ed. 239, was recently pointed out by the Supreme Court in *Commissioner v. Harmon,* 323 U. S. 44, 89 L. Ed. 60, when it said that the wife's interest "is an original and not a derivative vested property interest."

Respectfully submitted,

Leon B. Brown,

John W. Ervin,

Amici Curiae.